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In The Supreme Court of the United States

DANNY SYLVESTER VICK,

Petitioner,

v.

JOHN R. WILLIAMS,
in his official capacity as Superintendent
of the Tiller Correctional Institution,
NC Department of Correction,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:99-HC-143-BR(2)

DANNY SYLVESTER VICK, Petitioner,	)	
v.	)	MEMORANDUM AND
JOHN WILLIAMS, Supt., Tillery Correctional Center, Respondent.	)	RECOMMENDATION

Petitioner, a state prisoner, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion for summary judgement, and Petitioner has responded. This motion is ripe for disposition.

BACKGROUND

In January of 1996, the Raleigh Police Department Drug and Vice Task Force ("RPD") received information from a confidential informant that Petitioner was involved in the illegal distribution of cocaine. The RPD conducted surveillance of Petitioner and his residence for several weeks and on March 11, 1996, observed Petitioner making a

delivery of a controlled substance to an informant. On May 8, 1996, during a controlled buy, RPD detectives observed Petitioner deliver cocaine to an informant. Following this exchange, Detective Wisniewski of the RPD obtained a search warrant for Petitioner's apartment.

The Selective Enforcement Unit ("SEU") of the RPD executed the search warrant on May 8, 1996. After drugs were found in Petitioner's refrigerator, Petitioner was arrested and charged with multiple counts of trafficking in cocaine. Following his arrest on May 8, 1996, the North Carolina Department of Revenue served Petitioner with a Notice of Controlled Substance Tax Assessment in the amount of $63,616.50. To satisfy this assessment, the North Carolina Department of Revenue placed a lien on all of Petitioner's real property and seized numerous items of Petitioner's personal property.

PROCEDURAL HISTORY

On September 23, 1996, Petitioner was indicated by the Wake County Grand Jury on seven counts of trafficking in cocaine. On December 2, 1996, Petitioner filed a motion to dismiss on double jeopardy grounds and a motion to suppress evidence seized during the search of his apartment.

The double jeopardy claim was summarily denied by the Honorable Judge Narley L. Cashwell on February 17, 1997. Judge Cashwell conducted a pre-trail suppression hearing on January 16-17, and February 10, 1997. On June 17, 1997, Judge Cashwell denied Petitioner's motion to suppress.

On March 11, 1997, Petitioner gave written notice of his intention to appeal the judgement, conviction, and sentence imposed, as well as the trial court's denial of the motion to suppress and motion to dismiss on double jeopardy grounds. After giving this notice, Petitioner entered a guilty plea. On March 12, 1997, Petitioner was sentenced to two consecutive terms of 35-42 months imprisonment.

On December 1, 1997, the North Carolina Court of Appeals denied Petitioner's certiorari petition on the double jeopardy issue. On March 3, 1998, Petitioner filed a petition for writ of certiorari with the Supreme Court of North Carolina, which denied review of Petitioner's double jeopardy claim on March 6, 1998.

Petitioner also appealed the denial of his motion to suppress. On July 21, 1998, the North Carolina Court of Appeals affirmed Petitioner's sentence and convicted in all respects. On December 3, 1998, the Supreme Court of North Carolina denied Petitioner's petition for discretionary review and dismissed Petitioner's appeal.

PETITIONER CLAIM

Petitioner claims that the search of his apartment violated the Fourth Amendment's prohibition against unlawful searches and seizures. Petitioner also claims that his convictions and sentences violated the Fifth Amendment's prohibition against double jeopardy. Petitioner asserts that the Controlled Substance Tax assessment and the attendant seizure of his property amounted to a previous prosecution and punishment for the same offense.

ANALYSIS

1. Fourth Amendment Claim

This court's power to decide Petitioner's Fourth Amendment claim is dictated by the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976), which states, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief." Stone, 428 U.S. at 494.

The undersigned finds that petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court. Petitioner's Fourth Amendment claim was heard by Judge Cashwell during a pre-trial suppression hearing.

After Petitioner's motion was denied by the trial judge, Petitioner appealed the decision to the North Carolina Court of Appeals, which affirmed. Finally, the Supreme Court of North Carolina denied further review of Petitioner's claim. Therefore, it is recommended that Respondent's motion for summary judgement be GRANTED as to this claim.

II. Double Jeopardy Claim

A. Standard of Review

The standards of review for habeas petitions in federal court is governed by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA provides that an application for a writ of habeas corpus shall not be granted unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1) (Supp. 1998.) The Fourth Circuit recently interpreted the meaning of the AEDPA standards in Green v. French, 143 F.3d 865 (4th Cir. 1998). The court in Green recognized the overlapping meanings of the phrases "contrary to" and "unreasonable application of" as used in common parlance. See Green, 143 F.3d at 870. However, the court, in its analysis, set out the precise meaning of each phrase "so as to

accord it a meaning different from, and independent of, the other." Id.

In elaborating on these independent meanings, the court stated:

> [A] decision is "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Id.

The court distinguished the meaning of "unreasonable application of" by stating:

> [A] decision represents an "unreasonable application of" precedent only when that decision applies precedent in a context different from the one in which the precedent was decided and one to which the legal principle of the precedent is not reasonable, when that decision fails to apply the principle of a precedent in a context where such failure is unreasonable, or when that decision recognizes the correct principle from the higher court's precedent, but unreasonably applies that principle to the facts before it (assuming the facts are insufficiently different from those that gave rise to the precedent as to constitute a new context for consideration of the principle's applicability).

Id.

Under Green, the writ of habeas corpus should issue "[i]f a state court decision is in square conflict with a [Supreme Court] precedent . . . which is controlling as to law and facts." Id. However, if the state court decision is not "contrary to" any such controlling decision, "habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." Id.

B. Application

1. "Contrary to" Supreme Court Precedent

Petitioner argues that the state court's denial of his petition for habeas relief was contrary to clearly established federal law as determined by the Supreme Court in Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994). In Kurth Ranch, the Court held that Montana's Dangerous Drug Tax Act constituted a criminal penalty and that the proceeding initiated to collect the tax violated the constitutional prohibition against successive punishment for the dame offense. See Kurth Ranch, 511 U.S. at 784.

A decision is "contrary to" Supreme Court precedent only when that decision, "either through a decision of pure law or the application of law to facts *indistinguishable* in *any material way* from those on the basis of which the precedent

was decided. . . . reaches a legal conclusion or a result opposite to and *irreconcilable* with that reached in the precedent that addresses the identical issue." Green v. French, 143 F.3d 865, 870 (1998) (emphasis added). The facts in Petitioner's case must be "indistinguishable in any material way" from the facts in Kurth Ranch for the state court's adjudication of Petitioner's claim to be "contrary to" controlling precedent.

This court is not convinced that Petitioner's case is indistinguishable from Kurth Ranch. The Supreme Court in Kurth Ranch found that the Montana tax "taken as a whole . is a concoction of anomalies, too far removed from a standard tax assessment to escape characterization as a punishment for the purpose of double jeopardy analysis. "Montana Dep't of Revenue v. Kurth Ranch, 522 U.S. 767, 783 (1994). The Court discussed two particular "unusual features" of the Montana tax which "set the Montana statue apart from most taxes." Kurth Ranch, 511 U.S. at 781. The unusual feature of the Montana tax described by the Court were as follows: (1) it was predicated on a crime and was exacted only after the taxpayer had been arrested for the precise conduct that gave rise to the tax obligation; and (2) it was a "property tax" levied on goods that the taxpayer did not own possess at the time the tax was imposed. Id. The

Court's emphasis on these features indicates that they were material to the Court's final decision.

The North Carolina drug tax statute does not include those features that the Kurth Ranch Court deemed "unusual." Unlike the Montana drug tax, the North Carolina tax is not predicated on the taxpayer's arrest. The North Carolina tax "is payable within 48 hours after a dealer acquires actual or consecutive possession of a non-taxed-paid unauthorized substance." N.C.G.S. § 105-113.109 (1992). The North Carolina drug tax statute also provides for confidential payment of the tax and prohibits the use of information obtained pursuant to the tax in any criminal prosecution other than for a violation of the tax itself. See N.C.G.S. § 105-113.112. Therefore, unlike the Montana tax, the North Carolina tax is not contingent upon the dealer's arrest and may be paid on goods while they are still in the possession of the taxpayer.

Petitioner's asserts that the facts of his case are "indistinguishable in any material way" from the facts of Kurth Ranch, citing to the Fourth Circuit's opinion in Lynn v. West, 134 F.3d 582 (4th Cir. 1998). In Lynn, the court held that because North Carolina's Controlled Substance Tax (drug tax) was not distinguishable from the Montana tax discussed in Kurth Ranch, the North Carolina "Drug Tax is

in reality a criminal penalty under Department of Revenue v. Kurth Ranch." Lynn, 134 F.3d at 584. However, the Fourth Circuit's analysis in the Lynn decision necessarily differs from the analysis of Petitioner's habeas claim. In Lynn, the Fourth Circuit was considering a claim for damages and injunctive relief under 42 U.S.C. § 1983. When it stated that the two taxes were not distinguishable, it was not bound by and was not applying the strict standards applicable on habeas review.

The undersigned has examined the drug taxes at issue in Kurth Ranch and in the present case, as required by 28 U.S.C. § 2254 and Greens v. French, and concludes that the North Carolina and Montana drug taxes are materially distinguishable for purposes of double jeopardy analysis. Thus, the Kurth Ranch decision is not directly controlling on the facts of this case, and the North Carolina courts' adjudication of the double jeopardy issue was not contrary to a controlling Supreme Court precedent.

2. "Unreasonable Application of" Supreme Court Precedent

This court still must determine whether the state court's decision was an unreasonable application of Supreme Court precedent. A state court decision is an "unreasonable application of" Supreme Court precedent if "the state courts

have decided the question by interpreting or applying the related precedent in a manner that reasonable jurists would agree that the North Carolina state court's application of Kurth Ranch was unreasonable.

In the order denying Petitioner's motion to dismiss, Judge Cashwell relied on the North Carolina Court of Appeals' decision in State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), and found that the North Carolina tax did not constitute punishment for the purpose of double jeopardy analysis. (App. To Pet. Vol. 1 at 38-39) the North Carolina Court of appeals did not explain its decision. Therefore, the superior court's decision is the "last reasoned decision" for purposes of habeas analysis. Because the superior court based its decision on the Ballenger court's application of Kurth Ranch, this court must determine whether Ballenger represents an unreasonable application of Kurth Ranch.

The Ballenger court found that North Carolina's drug tax did not violate the prohibition against double jeopardy. See Ballenger, 123 N.C. App. At 184, 472 S.E2d at 575. The court found that the North Carolina drug tax "contains neither of the 'unusual features' upon which the Supreme Court relied in Kurth Ranch to conclude that Montana's dangerous drug tax constituted punishment for double

jeopardy purposes." Ballenger, 123 N.C. App. At 183, 472 S.E.2d at 574. The Ballenger court found that the North Carolina tax is not punitive because it is not predicated on a taxpayer's arrest and it is not "assessed on property that necessarily has been confiscated or destroyed." Id.

At least one federal court has addressed the reasonableness of the Ballenger decision. In McAdams v. Hardin, No. 1:98CV786 (M.D.N.C. October 15, 1998) (J. Osteen adopting recommendation of M.J. Sharp), the court denied the petitioner's motion to stay a state court proceeding based on the petitioner's double jeopardy claim. Although the court did not reach the merits of the petitioner's double jeopardy claim[1], the court stated that the petitioner's case failed to make a "colorable claim" of double jeopardy. The court considered the decisions of other state appellate courts and stated that these cases "tend to show that reasonable jurists can and do agree with the North Carolina appellate courts' adjudication of this double jeopardy issue, although still contrary to the Fourth Circuit's adjudication in Lynn." McAdams, No. 1:98CV786 (M.D.N.C. October 15, 1998).

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[1]The court dismissed petitioner's motion for failure to exhaust available state remedies.

Other state and federal courts have found state drug taxes substantially similar to North Carolina's drug tax to be distinguishable from Kurth Ranch. As Respondent notes, these court decisions relied on an analysis similar to that used by the North Carolina Court of Appeals in Ballenger. See, e.g., Padavich v. Thalacker, 162 F.3d 521, 523 (8th Cir. 1998) (holding that Iowa's drug tax is not a criminal punishment and is distinguishable from Kurth Ranch because it "lacks the other punitive characteristics the Supreme Court found controlling in Kurth Ranch"), cert. denied, 119 S. Ct. 2374 (1999) ; McMullin v. South Carolina Dep't of Revenue, 321 S.C. 475, 469 S.Ed.2d 600 (1996) (holding that the South Carolina drug tax was not punitive for double jeopardy purposes because it did not contain the "unusual features" cited by the Kurth Ranch majority); State v. Gulledge, 257 Kan. 915, 896 P.2d 378 (1995) (finding Kansas tax distinguishable from Montana tax); State v. Stubblefield, 249 Neb. 436, 543 N.W. 2d 743 (1996) (finding Nebraska's drug tax statute materially different from Montana's tax).

These state and federal cases indicate that reasonable jurists could find the North Carolina appellate court's application of Kurth Ranch in Ballenger to be reasonable. Therefore, the lower court's reliance on Ballenger in

Petitioner's case was also reasonable. Because the state court reasonably applied related Supreme Court precedent, Petitioner's petition for writ of habeas corpus should be DENIED[2].

CONCLUSION

The undersigned recommends that Respondent's motion for summary judgement be ALLOWED and that this case be DISMISSED. SO RECOMMENDED. this the ____ day of August. 1999.

ALEXANDER B. DENSON
United States Magistrate Judge

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[2]Because the undersigned has decided Petitioner's case on other grounds, he declines to address Respondent's arguments that: (1) Petitioner's claim fails the "elements" test established by Blockburger v. Unites States, 284 U.S. 299 (1932): (2) Petitioner's partial payment of the drug tax assessment is insufficient to constitute "punishment" for the purposes of double jeopardy analysis: (3) Petitioner's claim is barred by Teague v. Lane, 489 U.S. 288 (1988): and (4) Petitioner's waived his double jeopardy claim by pleading guilty.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:99-HC-143-BR(2)

DANNY SYLVESTER VICK,	)
Petitioner,	)
	)
v.	)
	)
JOHN WILLIAMS, SUPT.,	)
TILLERY CORRECTIONAL CTR,	)
NORTH CAROLINA DEPARTMENT	)
OF CORRECTIONAL	)
Respondent.	)

PETITIONER'S OBJECTION TO
MAGISTRATE JUDGE'S
MEMORANDUM AND RECOMMENDATION

The Petitioner, DANNY SYLVESTER VICK, respectfully submits the following objections to the Memorandum and Recommendation entered by the Honorable Alexander B. Denson, United States Magistrate Judge, in the above-captioned case on August 10, 1999. In support of these objections, Petitioner incorporates by reference, as if fully set forth herein, the Petitioner's Petition for Writ of Habeas Corpus, Reply to Respondent's Answer and Response to Motion for Summary Judgement and Incorporated Memorandum of Law and Response to

Respondent's Motion to Include in the Record Additional Tax Records and Incorporated Memorandum and further shows the following:

1. Petitioner objects to the Magistrate Judge's conclusion on page 8 that "the North Carolina and Montana drug taxes are materially distinguishable for purposes of double jeopardy analysis." This conclusion is directly contrary to the Fourth Circuit Court of Appeals' holding in Lynn v. West that, for double jeopardy purposes, the North Carolina drug tax "contains no features that allow us to distinguish Kurth Ranch." Lynn v. West, 134 F.3d 582, (4th Cir. 1998), and is incorrect.

Likewise the Magistrate Judge's analysis regarding the "distinctions" between the features of the Montana drug tax in Kurth Ranch and the features of the North Carolina drug tax is directly contrary to the analysis of the Fourth Circuit Court of Appeals in Lynn v. West, which held that the two drug taxes were not distinguishable for purposes of double jeopardy analysis.

Petitioner respectfully submits that the Fourth Circuit's holding in Lynn v. West, that for purposes of double jeopardy analysis the North Carolina drug tax is a criminal penalty under the controlling Supreme Court precedent of Montana Department of Revenue v. Kurth

Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) should be binding on the Federal trail courts as to that issue.

2. Petitioner objects to the Magistrate Judge's conclusion on Page 8 that "the Fourth Circuit's analysis in the Lynn decision necessarily differs from the analysis of Petitioner's habeas claim." Petitioner submits that as to the pivotal issue of whether the North Carolina drug tax constitutes a criminal penalty for double jeopardy purposes, there is no difference whatsoever between the analysis of the Fourth Circuit in Lynn v. West and the analysis required in Petitioner's case here. The Fourth Circuit held in Lynn v. West that the Kurth Ranch decision was controlling precedent on the issue of whether the North Carolina drug tax constituted a criminal penalty. In the state court decision in Petitioner's case, the state court held that the Kurth Ranch decision was not controlling precedent as to wether the North Carolina drug tax is a criminal penalty. While the Fourth Circuit and the state court reached opposite results, the analysis is identical, i.e., wether the Supreme Court's decision in Kurth Ranch represents "controlling precedent" as to the North Carolina drug tax. Petitioner respectfully submits that there is no legal basis for the Magistrate Judge's conclusion.

3. Petitioner objects to the Magistrate Judge's conclusion on Page 8 that ". . . Kurth Ranch decision is not directly controlling on the facts of this case, and the North Carolina courts' adjudication of the double jeopardy issue was not contrary to a controlling Supreme Court precedent." This conclusion is in direct conflict with the Fourth Circuit's decision in Lynn v. West, which applied the Kurth Ranch decision to the North Carolina drug tax as a controlling Supreme Court precedent. Under Lynn v. West, the Supreme Court's decision in Kurth Ranch is a controlling Supreme Court precedent as to the issue of wether the North Carolina drug tax constitutes a criminal penalty for purposes of double jeopardy analysis.

4. Petitioner objects to the Magistrate Judge's statement on Page 11 that "other state and federal courts have found state drug taxes substantially similar to North Carolina drug tax to be distinguishable from Kurth Ranch." Petitioner respectfully submits that those other state statutes are not substantially similar to the North Carolina drug tax. Petitioner further submits that, in light of the controlling precedents of Kurth Ranch and Lynn v. West, the interpretations of other state courts regarding their own drug tax status is not dispositive here.

5. Petitioner objects to the Magistrate Judge's

application of the "unreasonable application" prong of 28 U.S.C. 2254 (d)(1), rather than the "contrary to" prong of 28 U.S.C. 2254 (d) (1) to this case, on the grounds that the decision in Kurth Ranch is a "controlling precedent of the Supreme Court of the United States" in that the North Carolina Drug Tax and the Montana Drug Tax in Kurth Ranch are indistinguishable in any *material way*. (Memorandum and Recommendation, pp. 7, 9-12.) The state court's decision in Petitioner's case is contrary to Kurth Ranch and therefore the less stringent "unreasonable application" prong of 28 U.S.C. 2254 (d) (1) is not applicable here.

6. Petitioner objects to the Magistrate Judge's conclusion on Page 12 that "reasonable jurists could find the North Carolina appellate court's application of Kurth Ranch in Ballenger to be reasonable, and that the lower court's reliance on Ballenger was also reasonable," for the reasons stated above and in Paragraph 7 below.

6. Petitioner objects to the Magistrate Judge's conclusion on Page 12 that the state court "reasonably applied related Supreme Court precedent." As stated above, the Supreme Court's decision in Kurth Ranch was "controlling precedent" which mandated the state court to hold that the North Carolina drug tax constituted a criminal

penalty for purposes of double jeopardy. In light of such controlling precedent, the state court's decision cannot be deemed a reasonable application of Kurth Ranch. Additionally, Petitioner submits that under either standards of review, the state court's decision was not a reasonable application of Kurth Ranch.

7. Petitioner objects to the Magistrate Judge's conclusion on Page 12 that Petitioner's Petition for Writ of Habeas Corpus should be denied, that summary judgement should be allowed and that this case be dismissed, for the reasons discussed above and in Petitioner's previous pleadings.

RESPECTFULLY SUBMITTED this the ____ day of August, 1999.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:99-HC-143-BR(2)

DANNY SYLVESTER VICK, Petitioner,	)	
v.	)	CERTIFICATE OF SERVICE
JOHN WILLIAMS, Supt., Tillery Correctional Center, Respondent.	)	

This is to certify that the undersigned has this day served a copy of the foregoing Petitioner's Objection to Magistrate Judge's Memorandum and Recommendation by mailing a copy of the same in the United States mail, postage prepaid, addressed as follows:

TO: John Williams, Superintendent
Tillery Correctional Institution
Post Office Box 222
Tillery, NC 27887

Clarence DelForge, III
N.C. Attorney General's Office
PO Box 629
Raleigh, NC 27602

This the ____ day of August, 1999.

_____
GEORGE B. CURRIN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:99-HC-143-BR(2)

DANNY SYLVESTER VICK, Petitioner,	)	
v.	)	ORDER
JOHN WILLIAMS, Supt., Tillery Correctional Center, Respondent.	)	

This matter is before the court on the Memorandum and Recommendation ("M&R") of United States Magistrate Judge Alexander B. Denson filed 10 August 1999. Petitioner's filed objections to Magistrate Judge Denson's M&R on 19 August 1999.

The court has conducted the required de novo review of the M&R, paying particular attention to those portions to which petitioner's objected. The court finds petitioner's objections to be without merit and the same are hereby OVERRULED. The court adopts Magistrate Judge Denson's M&R as its own, and for the reasons stated therein, respondent's motion for summary judgement is GRANTED and this petition is hereby DISMISSED.

This the ___ September 1999.

W. Earl Britt
Senior United States District Judge